Supreme Court, U.S.
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No. 91-1850

In The

Supreme Court of the United States

October Term, 1992

FRANK JAMES,

Petitioner,

versus

MILWAUKEE COUNTY and FRANKLIN LOTTER,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Respondent respectfully submits that this case does not warrant the Court's extraordinary and discretionary consideration. The law in the area of Eighth Amendment protections accorded to inmates of prisons is well settled and there are no conflicts among the various circuits. The decisions of the Courts below follow well settled law and are clearly correct. The Eighth Amendment limitations on conditions of penal confinement, imposed upon the states through the Fourteenth Amendment, do not join issues of first impression. The Supreme Court turned its attention and consideration to that area over twenty years ago and, among its more current teaching summarized its unwavering convictions. *U.S. vs. State of Michigan*, 940 F.2d 143, 152 (6th Cir., 1991).

COUNTER-STATEMENT

In this civil rights action, the Plaintiff seeks compensation for injuries he suffered from a fight with another inmate while incarcerated at the Milwaukee County House of Correction. The injuries suffered by the Plaintiff rendered him a quadriplegic. But for the tragic and permanent extent of the injuries which resulted to this Plaintiff this litigation probably never would have been commenced. The insurmountable hurdle for this Plaintiff is the fact that the deep-pocket in this case is not a person or entity which actually caused the injury. This is an extremely difficult burden which has not been met by the facts of this case.

There are basically two theories upon which the Plaintiff could have prevailed. The first theory of liability under the Eighth Amendment would encompass those situations where a prison employees have actual knowledge of a threat to the physical safety of the Plaintiff. The second theory would encompass a situation where an inherently dangerous situation is allowed to exist. It seems to be the second theory upon which the Plaintiff has attempted to prevail in this litigation.

THE CASES CITED BY THE PLAINTIFF DO NOT SUPPORT HIS THEORY

The Plaintiff has proposed to the trial judge and the 7th Circuit Court of Appeals that a classification system for the housing of inmates is a right which is protected by the Eighth Amendment. Yet none of the cases cited by the Plaintiff remotely support this proposition.

In those cases where the Court found that prisoners were subjected to egregious and flagrant conditions, a prison classification system was found simply to have contributed to the inhuman, degrading and violent atmosphere of the prison. As the Court in *Gates vs. Collier*, 501 F.2d 1291 (5th Cir., 1974) stated at p. 1309, the total effect of overcrowding, lack of classification according to offense, untrained inmates with weapons, lack of supervision and the absence of a procedure for confiscation of weapons created a pervasive risk of harm to inmates. But the Court further states that none of these conditions taken alone would invoke constitutional protections.

As precisely stated by the 7th Circuit in the decision of this case, p. 8 n. 4:

> Thus, the issue here is not whether a policy existed but, whether the policy at issue inflicted wanton and unnecessary pain on inmates.

The policy of placing probation and parole violators in the same dorm facility is acknowledged. The issue is the nexus between this policy and the injuries to the Plaintiff. It must be proven that the policy creates a pervasive risk of harm to probation violators or non-violent prisoners. *Marsh vs. Arn*, 937 F.2d 1056 (6th Cir., 1991). One avenue open to a Plaintiff for proving such a claim would be evidence of numerous assaults on inmates with non-violent convictions by inmates with violent convictions, if such evidence existed. This is simply a method of proof, not a requirement. Yet the Plaintiff would have this Court make such a finding with no proof at all. At p. 13 in this petition the Plaintiff states:

> The fact that mixing violent and non-violent inmates in an open dormitory under the supervision of one guard creates a risk of harm is so obvious that it need not be stated.

Well, not only does it need to be stated, it needs to be proven.

CONCLUSION

The protections given a prisoner under the Eighth Amendment have been clearly enunciated by this Court and the various circuits are not in conflict. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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